Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 93-25
	)	
Direct Broadcast Satellite Public Service Obligations	)	

REPLY OF THE ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS AND THE PUBLIC BROADCASTING SERVICE TO OPPOSITION TO PETITION FOR RECONSIDERATION

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TO: The Commission

REPLY OF
THE ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS
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TO OPPOSITION TO PETITION FOR RECONSIDERATION

The Association of America's Public Television Stations ("APTS") and the Public Broadcasting Service ("PBS") have petitioned for reconsideration of the one-channel-per-programmer limitation the Commission imposed on direct broadcast satellite ("DBS") providers in connection with the capacity reserved for noncommercial programming. DirecTV and the Satellite Broadcasting and Communications Association agree that there is no basis for the limitation and that it is inconsistent with the public interest.[1] Only DAETC/CME oppose the APTS/PBS petition.[2] These reply comments address the DAETC/CME arguments.

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[1] *See* Opposition and Comments of DIRECTV, Inc., pp. 12-14; Opposition and Comments of the Satellite Broadcasting and Communications Association, pp. 6-7.

[2] *See* Opposition to and Response to Petitions for Reconsideration of DAETC and CME, et al. ("DAETC/CME Opp."), pp. 4-19.

I. THERE IS NO POLICY BASIS FOR THE ONE-CHANNEL-PER-PROGRAMMER LIMIT.

DAETC/CME argue that there is a need for the one-channel limitation, but they fail to support this claim. They assert first that the record in this proceeding supports the one-channel limit. However, they do not explain what information in the record provides a basis for that limit.[3]

DAETC/CME also argue that, without the one-channel limit, DBS providers will be inclined to choose a limited number of noncommercial programmers, based on administrative simplicity and commercial incentives. But DAETC/CME point to no evidence that considerations of administrative simplicity have led DBS providers to choose non-diverse programming in the past.[4] And in *National Ass'n of Broadcasters v. FCC,* 740 F.2d 1190 (D.C. Cir. 1984), cited by DAETC/CME, the court noted the Commission's recognition that DBS providers have commercial incentives to engage in "counter programming" in order to maximize their audience. *Id.* at 1207.

DAETC/CME insist (Opp., p. 14) that "source diversity" is crucial and that "[b]y definition, . . . multiple shows from the same programmer are not diverse." But the Commission expressly stated (Report & Order ¶ 117) that it was

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[3] DAETC/CME Opp., pp. 12-13 & n.10. The materials cited appear to consist primarily of a conclusory statement in the initial DAETC/CME Comments and a legal memorandum on the subject of editorial control.

[4] Of course, if DBS providers really were motivated by administrative simplicity, they would likely use a "first-come, first-served" approach.

seeking "diverse programming." Moreover, as noted in one of the cases DAETC/CME cites, the public interest in diversity is not solely concerned with stimulating sources. In discussing the prime time access rule, the Second Circuit explained that "[m]ere multiplication of sources, without contribution to diversity of programming, in the long run might not be in the 'public interest.'"[5] Contrary to DAETC/CME's assertions, the one-channel-per-programmer limitation could result in a proliferation of low quality, copy-cat programming, rather than diverse programming, while a single programmer could provide two or three high quality services directed at different audiences. Equating diverse *programming* with diverse *programmers* simply has no basis in the record.

In any event, a one-channel limitation amounts to regulatory overkill. Having selected the percentage of DBS capacity to be reserved for noncommercial programming, as Congress authorized, the Commission should rely on the marketplace to select the best programming. *See* Part II, *infra*. The already large number of DBS channels is expanding, due to advances in digital technology. *See* Report & Order ¶ 71. A DBS provider that today has five set-aside channels could have 10, or even 20, set-aside channels within a matter of months. Thus, even if the provider devotes two or three channels to services of a single programmer, it is likely to provide substantial "source diversity." And, over time, the one-channel

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[5] *National Association of Independent Television Producers & Distributors v. FCC*, 516 F.2d 526, 542 (2d Cir. 1975).

limit becomes more onerous, representing a lower and lower percentage of total capacity.

DAETC/CME insist that certain viewpoints will not be represented if "APTS/PBS" are permitted to "monopolize" the set-aside capacity because public television supposedly is subject to political pressures. This argument is absurd and totally unsupported by evidence.[6] As DAETC/CME note (Opp., p. 14 & n.12), public television has been attacked from both ends of the political spectrum — the best evidence that its services present a wide range of viewpoints.[7]

The fact remains that public television provides a prime illustration of why the one-channel-per-programmer limitation is misguided. Public television devotes extensive resources to just what the Commission wants to promote: "increased development of quality educational and informational programming for carriage on the set-aside channels" and development of "programming directed at traditionally underserved audiences." Report & Order ¶ 116. PBS programming

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[6] APTS and PBS do not seek to "monopolize" anything. They merely seek, consistent with Congress's mandate of universal access to public television services, to ensure that viewers have the opportunity to enjoy these services.

[7] Moreover, institutional safeguards protect public television from undue political pressure. Congress established the Corporation for Public Broadcasting for the express purpose of insulating public broadcasting from government control, anticipating that the creation of this independent entity would permit "programs free of political pressure." S. Rep. No. 222, 90th Cong., 1st Sess. 4 (1967); H.R. Rep. No. 572, 90th Cong., 1st Sess 15 (1967). That is precisely the safeguarding function that CPB has fulfilled, and continues to fulfill. To satisfy itself that public television presents balanced programming, Congress requires CPB to submit an annual objectivity and balance report. *See* Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 19, 106 Stat. 949, 956 (1992).

alone covers a wide range of subjects, is aimed at many different audiences, and is drawn from a variety of sources.[8] In accordance with its statutory mandate, public television devotes substantial resources to serving traditionally underserved audiences, for example, by making programming accessible to persons with disabilities and by developing extensive educational programming for children.[9]

PBS is now offering to DBS providers its new "PBS Kids" channel, a service devoted to programming for children. It would be ironic if, as a result of the one-channel limitation, a DBS provider that chooses PBS Kids for its set-aside capacity could not add another PBS service directed to a different audience. This would surely stifle just the sort of incentive for innovative program development that the Commission says it wants to foster. The point is not confined to PBS; it applies to any eligible noncommercial programmer that has worked to develop multiple services.

II. THE COMMISSION LACKS AUTHORITY TO IMPOSE THE ONE-CHANNEL-PER-PROGRAMMER LIMIT.

DAETC/CME point to nothing in the language or legislative history of Section 25 that refers to a one-channel-per-programmer restriction. Rather, they

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[8] *See* APTS/PBS *ex parte* filing dated September 22, 1997.

[9] Public television also offers substantial programming tailored in part to the interests of various ethnic and racial minority audiences. Since September 1998, PBS has provided member stations with nearly 100 hours of programming featuring minorities. Examples include programs on the Black press, W.E.B. Du Bois, Hopi quilts, and storytellers of the Pacific.

argue that the Commission's general authority to promote the public interest is sufficient to support the limitation. This argument is without merit.[10]

The public interest standard does not confer unbounded discretion to create requirements not provided for by Congress; in general, there must be a "specific statutory basis for the Commission's authority."[11] The cases cited by DAETC/CME in support of their argument involve areas of regulation — such as ownership restrictions or community antenna television rules — for which Congress had provided no statutory framework, leaving a void to be filled by the Commission.[12] The courts concluded that the regulations in question fell within the Commission's authority "reasonably ancillary" to the effective performance of its

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[10] DAETC/CME also argue that the one-channel-per-programmer limit is authorized by Section 25(a). However, as in the case of the Commission's general rulemaking authority, a broad provision for "public interest" regulation does not justify adding requirements to the specific obligations defined in subsection (b).

[11] *American Telephone & Telegraph Co. v. FCC*, 487 F.2d 865, 872 (2d Cir. 1973). *See also National Broadcasting Co. v. United States*, 319 U.S. 190, 216 (1943) (public interest standard is not "so indefinite as to confer an unlimited power");*WOKO, Inc. v. FCC*, 153 F.2d 623, 628 (D.C. Cir.), *rev'd on other grounds*, 329 U.S. 223 (1946) (under public interest standard, Commission "must proceed within the scope of the authority granted to it"); 47 U.S.C. § 303(r) (Commission may make rules *"not inconsistent with law"* as necessary to carry out provisions of chapter).

[12] *See AT&T Corp. v. Iowa Utilities Board*, 119 S.Ct. 721 (1999) (intrastate communications); *FCC v. National Citizens Committee for Broadcasting,* 436 U.S. 775 (1978) (ownership restrictions); *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968) (community antenna television); *United States v. Storer Broadcasting Co.,* 351 U.S. 192 (1956) (ownership restrictions).

responsibilities.[13] These cases are clearly distinguishable. Not only are the subjects of regulation different; none of these cases addresses a situation in which Congress enacted a specific statutory scheme — like Section 25(b) — on which the Commission sought to engraft additional limitations.[14]

In some contexts courts have recognized that the Commission may regulate based on an interest in the promotion of diversity, as DAETC/CME suggest. However, the courts in these cases have been careful to ensure that the regulation in question is consistent with any applicable statutory authority.[15] Here, a general interest in diversity does not support a one-channel limit, because that limit is inconsistent with the scheme Congress prescribed. Congress acted to promote diversity by requiring that four to seven percent of DBS capacity be reserved for noncommercial programming, but it did not mention other limitations. Moreover, there are indications that Congress did not intend the Commission to go farther than what appears on the face of the statute. The 1992 Cable Act states a policy to "promote the availability . . . of a diversity of views and information," but

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13 *Southwestern Cable*, 392 U.S. at 178.

14 *See, e.g., AT&T*, 487 F.2d at 875-76 (distinguishing *Southwestern Cable* on the ground that CATV regulation had not been provided for in the statute).

15 *See, e.g., Mt. Mansfield Television, Inc. v. FCC*, 442 F.2d 470, 479-81 (2d Cir. 1971) (reviewing sources of statutory authority for prime time access, financial interest, and syndication rules).

also to *"rely on the marketplace, to the maximum extent feasible, to achieve that availability."*[16]

In addition, Congress elected not to enact a provision, included in both the House and Senate bills, that would have established a panel to study, among other things, methods of selecting programming for the set-aside capacity.[17] The conference report makes no other reference to restrictions on selection of programmers; it states merely that the purpose of Section 25(b) is to define the obligation of DBS providers "to provide a minimum level of educational programming."[18] In these circumstances, a generalized interest in diversity is not a sufficient basis for imposing limitations beyond those Congress chose.[19]

DAETC/CME insist that reliance on the marketplace is improper here because the set-aside capacity was created to correct a market failure. But Congress did not exclude Section 25(b) from its statement of policy; there is room for the marketplace to operate under this part of the statute. Once the basic

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16 1992 Cable Act § 2(b)(1), (2) (emphasis added).

17 *See* H.R. Rep. No. 102-862, 102d Cong., 2d Sess. 99-100 (1992).

18 *Id.* at 100.

19 The situation here is similar to *AT&T v. FCC*, *supra*, where the court rejected the Commission's claim that its broad power to regulate allowed it to require a carrier to obtain special permission before filing tariff revisions. The court noted that, in enacting rate filing provisions, Congress struck a "'careful balance of interests,'" and "intended that specific statutory authority, rather than general inherent equity power, should provide the agency with its governing standards." 487 F.2d at 872 (quoting *United States v. SCRAP*, 412 U.S. 669, 697 (1973)). (continued...)

market failure is addressed by the express statutory requirement that a certain amount of noncommercial programming be carried, DBS providers can and should be able to choose those noncommercial programmers they believe will be most attractive to their viewers. There is no indication that Congress perceived any market failure in connection with selection of particular noncommercial programmers. Moreover, the one-channel limit frustrates congressional intent by closing off opportunities for carriage of programming of public television stations and other public telecommunications entities, which are expressly designated by the statute as eligible for the set-aside.[20]

The only case involving DBS that is cited by DAETC/CME, *NAB v. FCC, supra*, does not support the Commission's action here. The court in *NAB* approved the Commission's decision to leave use of the DBS spectrum unregulated in various respects. The court accepted the Commission's judgment that lack of regulation might promote diversity more effectively than limitations on the amount of spectrum a single provider could control. 740 F.2d at 1207. This is the very principle the Commission has disregarded here.

The Commission was "not authorized to circumvent th[e] statutory scheme by making its own equitable adjustments." *Id.* at 881.

[20] DAETC/CME assert (Opp., pp. 8, 11-12) that APTS/PBS is claiming an "exclusive entitlement" to carriage. This is nonsense and a gross distortion of the APTS/PBS position. The argument extends to any type of entity designated as eligible under the statute.

CONCLUSION

The Commission should withdraw the one-channel-per-programmer limitation on use of the set-aside capacity.

Respectfully submitted,

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June 1, 1999

CERTIFICATE OF SERVICE

I hereby certify that, on this 1st day of June, 1999, I caused the foregoing Reply of The Association of America's Public Television Stations and The Public Broadcasting Service to Opposition to Petition for Reconsideration to be served on the following by first-class mail, postage prepaid:

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